State of New Hampshire

v.

Lorayne D. Pincence and First Horizon Home Loan Corporation

Docket No.: 21472-05ED

REPORT OF THE BOARD

This matter arises as a result of an RSA 498-A:5 acquisition of property rights taken for an approved highway layout pursuant to authority conferred on the "Condemnor", the State of New Hampshire, by various statutes, including RSA 230:45. A Declaration of Taking was filed with the board on September 14, 2005 (with an amended Declaration filed on August 22, 2006) (collectively the "Declaration"). The Declaration was served on the named condemnees, Lorayne D. Pincence and First Horizon Home Loan Corporation, and described the property rights taken as a conservation easement interest in two parcels: Parcel No. 1095 consisting of 5.25 acres; and Parcel No. 1098 consisting of 103.125 acres; for a total of 108.38 acres (the "Property"). See Exhibit A to the Declaration. (Parcel No. 1098 contains an additional 4.31 acres and a dwelling not subject to the conservation easement of the Declaration.)

RSA 498-A:25 authorizes the board to hear evidence relative to an eminent domain condemnation and determine just compensation for the taking. In this process, the Condemnor has the burden of proving by a preponderance of the evidence the amount offered will justly compensate the condemnees. See Tax 210.12 and cases cited therein.

The board viewed the Property on July 24, 2007 and held the just compensation hearing at its offices on July 25, 2007. The Condemnor was represented by Ms. Lynnmarie C. Cusack, Assistant Attorney General and Lorayne D. Pincence (the "Condemnee") was represented by her husband, Mr. Jim Pincence and her brother, Mr. Lou Thompson.

Ms. Kimberly Kerwin of Bragan Reporting Associates, Inc., Post Office Box 1387, 1117 Elm Street, Manchester, New Hampshire, Telephone: (603) 669-7922 took the stenographic record of the hearing. Any requests for transcripts should be ordered directly through the reporter. Parties should expect at least four (4) weeks for completion of a requested transcript.

Parties' Arguments

The Condemnor submitted an appraisal performed by Mr. Dale M. Gerry of Shurtleff Appraisal Associates, Inc. (the "Shurtleff Appraisal"). He performed a complete before and after valuation and arrived at total damages of $70,000 as of the date of the taking. The Shurtleff Appraisal concluded the highest and best use before the taking to be a single-family residential lot of approximately 4+ acres with the balance being excess land available for limited forestry/excavation uses and recreational uses due to the vast majority of the acreage consisting of wetlands. After the taking and the encumbrance of the conservation easement, the Shurtleff Appraisal's highest and best use was determined to be as a single-family residential lot with limited forestry and buffer/recreational use of the 108+ acres encumbered.

The State also obtained a delineation report from Mr. James P. Gove of Gove Environmental Services, Inc. (the "Gove Report") which, through soil sampling of the Property, determined the vast majority of the 108 acres had wetland soils even before the construction of a dam on the Little Cohas Brook approximately fifty years ago. The Gove Report is contained

within the Shurtleff Appraisal and formed the basis for the Shurtleff Appraisal's premise that the 108 acres had no development potential even if the Little Cohas Brook Dam had been breached.

The Condemnee submitted an appraisal and addendum performed by Mr. Richard E. Marquis of Marquis Appraisal Associates, Inc. (the "Marquis Appraisal") which estimated a total "potential loss", due to the conservation easement encumbrance, of $346,000. The potential loss estimate was the sum of the loss in value to the 108 acres due to the imposition of the conservation easement of $211,000 and the loss of a potential rear lot valued at $135,000. The Condemnee argued the taking affected the ability of the Condemnee to potentially subdivide a rear lot behind the existing dwelling under the Town of Londonderry's Zoning Ordinance, section 3.4.1, which provides for back lot developments under certain conditions. The Marquis Appraisal adopted this premise and included the value of a "potential" rear lot in the "potential loss" estimate.

Board's Rulings

Based on the evidence the board finds the before and after values and damages are as follows:

Before value of the residence on the 4.31 acre parcel:	$265,000	
Before value of 108+/- acres of excess land:	$110,000	
Total before value:		**$375,000**
After value of the residence on the 4.31 acre parcel:	$265,000	
After value of 108+/- acres encumbered with a conservation easement:	$30,000	
Total after value;		**$295,000**
Total damages:		**$80,000**

The board's findings are derived from the Shurtleff Appraisal with two minor modifications which are detailed later. The board was unable to give any weight to the Marquis Appraisal for a number of reasons.

First, upon review of Mr. Marquis' experience, background, his appraisal, direct testimony and cross-examination by the State, the board concludes he was not qualified, without assistance,[1] to perform the unique appraisal assignment involving condemnation and conservation easements.

Mr. Marquis testified he has had neither experience nor training in eminent domain valuation; nor has he performed other conservation easement appraisals. While the board is not bound by the strict rules of evidence (RSA 71-B:7), in evaluating and weighing evidence it must consider the competency of each witness and the soundness of his conclusions.

Second, in estimating the after value of the 108 acres, Mr. Marquis relied on the sales of four properties acquired for conservation/recreational purposes by three municipalities in southern New Hampshire. While the board does not unilaterally disregard sales solely because they were sold to governmental entities, the board does agree with the standard enunciated in the Uniform Appraisal Standards for Federal Land Acquisition at B-18 that such sales are not as desirable due to municipalities having motivations distinct from private purchasers. If utilized, these sales must be fully investigated to determine whether they are reflective of market value. In this case it is clear that Mr. Marquis, other than inquiring of the purpose for which the properties were acquired by the municipalities, did not investigate thoroughly as to whether they

[1] The Uniform Standards of Professional Appraisal Practice ("USPAP") contains the "Competency Rule", which addresses steps an individual must take who lacks knowledge or experience in a certain valuation assignment. Such steps can include "personal study by the appraiser, association with an appraiser reasonably believed to have the necessary knowledge or experience, or retention of others who possess the required knowledge and experience." USPAP at 363-365.

were in excess of any appraisals which had been done, whether the values were similar to any other large, limited access transactions and whether the location adjacent to other current municipality owned property influenced the price the municipality was willing to pay. Given that lack of investigation and the inherent potential for the sale prices to be unreliable indicators of market value, the board gives no weight to their market value indications.

Third, the Marquis Appraisal assumed the rear lot subdivision potential did not exist in the after situation due to the effect of the conservation easement. The board has closely reviewed the zoning provisions at 3.4.1 of the Londonderry Zoning Ordinance ("Condemnor Exhibit No. 2") and the two letters submitted in the Marquis Appraisal Addendum from Mr. Timothy J. Thompson, Londonderry Town Planner, relative to the conceptual subdivision plan ("Condemnee Exhibit No. C") and concludes the imposition of a conservation easement does not impact any potential capability of subdividing a rear lot. While the conceptual plan and Mr. Thompson's letters highlight the constraints which Londonderry's conservation overlay district places on the potential subdivision of a rear lot, the taking's conservation easement does not appear to impact the use of the 416 feet of Hall Road frontage as a credit for the development of such a rear lot. In short, whatever capability existed for a rear lot is the same both before and after the taking and thus there is no property right loss or damage.

The Condemnee attempted to show through several aerial photos, presented but not marked as exhibits at the close of the hearing, the progression of the water from Little Cohas Brook due to the dam construction in the 1950's. However, the board finds the Condemnor carried its burden through the Gove Report and the testimony of Mr. Gove that the 108 acres were predominantly wetlands before the inundation from the dam. The soil borings and analysis performed by Mr. Gove indicate that, even before the artificial inundation of the Property, the

vast majority of the 108 acres were wetlands and would not have been suitable for development or uses more intensive than those the Property was capable of before the taking. While the Gove Report maps and the photographs contained in the Marquis Appraisal show various "islands" of upland soils, those islands are separated now and before the construction of the dam by wetland soils which would have precluded any systematic development of the Property beyond forestry/excavation and recreation uses.

Based on the conclusions of the Gove Report, the board finds the Shurtleff Appraisal competently performed a comparable sales approach to estimate a before value of approximately $1,000 per acre for the 108 acres of excess land. The board also finds the Shurtleff Appraisal's matrix approach to estimate the loss in the bundle of rights due to the imposition of the conservation easement to be reasonable and the 30% adjustment to the sale prices is reasonable. The board notes two revisions, however, are warranted, the first being minor and non-consequential and the second being of more consequence. First, the after sales comparison grid on page 69 of the Shurtleff Appraisal appears to inadvertently have the wrong date of valuation (stated as 2/9/2005, rather than 9/14/2005) and adjusting at the 3% annual rate for market condition increases the adjusted sale prices for comparable no. 1 to $422 per acre, comparable no. 2 to $142 per acre and comparable no. 3 to $70 per acre. Second, as the board noted during the hearing, Mr. Gerry's correlation of values in the before take scenario of $1,000 per acre gave most weight to comparable sale no. 1, which had an indicated adjusted price of $1,407. The $1,000 correlated price was approximately 71% of comparable sale no. 1's indicated adjusted price ($1,000 ÷ $1,407). In the after taking scenario on page 69, the revised comparable no. 1 adjusted sale price is $422 per acre, which if the same correlation relationship is applied as existed in the before take estimate, then the after value per acre is approximately $300 ($422 x

0.71). Utilizing the $300 per acre in the after valuation calculations, the total damages are $80,000 rather than $70,000. On this basis, the board determines the just compensation damages to the Condemnees to be $80,000.

If either party seeks to appeal the amount of damages awarded by the board, a petition must be filed in the Rockingham County Superior Court to have the damages reassessed. This petition must be filed within twenty (20) days from the clerk's date below. See RSA 498-A:27.

If the board's award exceeds the damage deposit, and if neither party appeals this determination, the Condemnor shall add interest to the excess award. The interest rate is established under RSA 336:1. Interest shall be paid from the taking date to the payment date. See RSA 524:1-b; Tax 210.11.

If neither party appeals the board's award, the board shall award costs to the prevailing party. RSA 498-A:26-a; see also RSA 71-B:9; Tax 210.13 and 201.39. In this case, the Condemnee is the prevailing party because the board's award exceeds the Condemnor's offer (or deposit) of damages. See Fortin v. Manchester Housing Authority, 133 N.H. 154, 156-57 (1990). The Condemnee may file a motion for costs within forty (40) days from the date of this Report if neither party appeals the board's award. The motion must include the following:

1) an itemization of the requested costs, Tax 201.39;

2) a statement that the prevailing party sought the other party's concurrence in the requested costs, Tax 201.18(b); and

3) a certification that a copy of the motion was sent to the other party, Tax 201.18(a)(7).

If the other party objects to the request for costs, an objection shall be filed within ten (10) days of the motion.

A list of recoverable costs can be found in Superior Court Rule 87. Expert fees are limited to reasonable fees incurred for attending the hearing. No fees are recoverable for preparing to testify or for preparing an appraisal. See Fortin, supra, 133 N.H. at 158.

SO ORDERED.

BOARD OF TAX AND LAND APPEALS

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Paul B. Franklin, Chairman

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Douglas S. Ricard, Member

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Albert F. Shamash, Esq., Member

Certification

I hereby certify copies of the foregoing Report of the board have been mailed, this date, to: Lynmarie C. Cusack, Esq., Department of Justice, 33 Capitol Street, Concord, NH 03301, counsel for the State of New Hampshire, Condemnor; Jim Pincence and Lou Thompson, 61 Hall Road, Londonderry, NH 03053, representatives for Lorayne D. Pincence, Condemnee; and First Horizon Home Loan Corporation, CT Corporation System, 9 Capitol Street, Concord, NH 03301, Mortgagee.

Date: August 29, 2007

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Anne M. Stelmach, Clerk